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COMMISSION ON HUMAN RIGHTS

SUB-COMMISSION ON PREVENTION OF DISCRIMINATION AND
PROTECTION OF MINORITIES

Forty-third session

SUMMARY RECORD OF THE 27th MEETING
(FIRST PART*)

Held at the Palais des Nations, Geneva,
on Friday, 23 August 1991, at 3.30 p.m.

Chairman: Mr. JOINET
later: Mr. TURK

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* The summary record of the second part of the meeting appears as document E/CN.4/Sub.2/1991/SR.27/Add.1.

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The meeting was called to order at 3.35 p.m.

THE ADMINISTRATION OF JUSTICE AND THE HUMAN RIGHTS OF DETAINEES (agenda item 10) (continued)

(a) QUESTION OF HUMAN RIGHTS OF PERSONS SUBJECTED TO ANY FORM OF DETENTION AND IMPRISONMENT

(b) QUESTION OF HUMAN RIGHTS AND STATES OF EMERGENCY

(c) INDIVIDUALIZATION OF PROSECUTION AND PENALTIES, AND REPERCUSSIONS OF VIOLATIONS OF HUMAN RIGHTS ON FAMILIES

(d) THE RIGHT TO A FAIR TRIAL

(E/CN.4/Sub.2/1991/19 and Add.1; E/CN.4/Sub.2/1991/20; E/CN.4/Sub.2/1991/21; E/CN.4/Sub.2/1991/22; E/CN.4/Sub.2/1991/24; E/CN.4/Sub.2/1991/25; E/CN.4/Sub.2/1991/26; E/CN.4/Sub.2/1991/27; E/CN.4/Sub.2/1991/28; E/CN.4/Sub.2/1991/29; E/CN.4/Sub.2/1991/50; E/CN.4/Sub.2/1991/53; E/CN.4/Sub.2/1991/56; E/CN.4/Sub.2/1991/60; E/CN.4/Sub.2/1991/NGO/18; E/CN.4/Sub.2/1991/NGO/19; E/CN.4/Sub.2/1991/NGO/26; E/CN.4/Sub.2/1991/NGO/27; E/CN.4/Sub.2/1991/NGO/28; E/CN.4/1991/18; E/CN.4/Sub.2/1990/10; E/CN.4/Sub.2/1990/30; E/CN.4/Sub.2/1990/32; A/CONF/144/28; A/CONF/144/INF.2)

INDEPENDENCE AND IMPARTIALITY OF THE JUDICIARY, JURORS AND ASSESSORS AND THE INDEPENDENCE OF LAWYERS (agenda item 11) (continued) E/CN.4/Sub.2/1991/30 and Add.1-4; E/CN.4/Sub.2/1991/NGO/17; E/CN.4/Sub.2/1990/35)

1. Mr. HATANO introduced the report of the Working Group on Detention (E/CN.4/Sub.2/1991/27). The Group had met three times during the current session, for a total of five hours, as well as for informal consultations among the five members of the Group, with the Secretariat, and with a number of non-governmental organizations.

2. The Working Group had selected six major topics, which it had been able to study with varying degrees of thoroughness. It had begun by reviewing developments concerning the human rights of detainees, and had gone on to consider habeas corpus as a non-derogable right, the death penalty, juvenile justice, privatization of prisons, and, lastly, model legislation on detention. It had studied the first two questions in detail, and the four others much more cursorily. He hoped that it would be possible to study the other questions in greater depth the following year.

3. With regard to the documentation submitted by the non-governmental organizations, some members of the Group had considered that it was of little use if the States in question were not named, while others had taken the view that other mechanisms existed to deal with specific cases of human rights violations, particularly under agenda items 6 and 9. It was clearly a difficult question, and one which deserved closer scrutiny. He and the other members of the Group were in agreement on the need for better coordination of the work done by the various United Nations bodies in the areas of combating crime and of criminal justice.

4. The topic of habeas corpus needed to be coordinated with related issues, such as the right to a fair trial. The members of the Working Group hoped that the question would continue to feature on the agenda of its next session. As for the question of capital punishment, Mr. Guissé had made an extremely useful presentation, and the members of the Working Group had asked him to prepare a document on the question for the next session.

5. Mrs. Bautista had prepared a most interesting report on the rights of detained juveniles (E/CN.4/Sub.2/1991/24), which the Group had unfortunately not had time to study. It would examine the report carefully, together with the study by Mr. Alfonso Martínez on the privatization of prisons (E/CN.4/Sub.2/1991/56), before the next session. With regard to item 6 of the Working Group's agenda, model legislation on detention, he proposed that the Group should consider it at its next session, which would enable it to take account of the views expressed on the question by the General Assembly and the Commission on Human Rights.

6. As a general principle, he considered it essential that the working groups should have more time at their disposal. He also hoped that all the documentation relating to the questions under consideration would be made available in all languages before the opening of the session. In conclusion, he proposed that some changes should be made in the allocation of time to the working groups, and hoped that adequate notice would be given if meetings were to be extended.

7. Mr. Türk took the Chair.

8. Ms. GRAF (International League for the Rights and Liberation of Peoples) drew the attention of members of the Sub-Commission to the case of Kosovo, a striking example of violation of the principle of independence of the judiciary, a principle the importance of which was universally acknowledged. Ninety per cent of the population of Kosovo was of Albanian stock. An autonomous region within Yugoslavia since 1974, Kosovo had seen all the components of its autonomy swept away in June 1990, by a law passed by the Assembly of Serbia. Under that law, which she considered unconstitutional, a state of emergency had been declared in Kosovo. As a result, its entire judicial system had been affected. In an initial period, since December 1990, the Assembly of Serbia had dismissed 300 members of the judiciary and had replaced them with Serbs and Montenegrins. The dismissals were without any legal basis, the names of those concerned having simply been published in the Official Journal. As a result, the functions of judge and public prosecutor were exercised exclusively by Serbs and Montenegrins, over an Albanian population. Subsequently, the courts and other judicial organs of Kosovo had been suspended; on 15 and 16 July 1991, the Parliament of Serbia had voted in favour of abolition of the Office of the Public Prosecutor and the Supreme Court of Kosovo, the two highest bodies.

9. In that connection, she referred to the case of Alishefik Spahiu, a judge in the Ferizaj Court since 1968, who had recently been relieved of his duties. He and his family had been subjected to threats; he had been interrogated and beaten, before spending 30 days in prison. He was now without a job. She vouched for the authenticity of those facts, and asked the Rapporteur to reflect them in his report.

10. Mr. di TIRO (Liberation) described the use of the judiciary by Indonesia to suppress the Acheh/Sumatra National Liberation Front as an abuse of power. Referring to the independence and impartiality of the judiciary, he considered it important to stress that there were situations in which judges did not hesitate to pass judgements that were consistently favourable to the ruling power, at the expense of a people under colonial rule; that was exactly the situation in Acheh/Sumatra, where every court decision was inseparable from the existing totalitarian system.

11. Referring to the 10,000 or so civilians killed (5,000 according to a February 1991 European Parliament resolution condemning the Acheh massacre), most of whom were victims of torture and extrajudicial killings, he pointed out that only 21 out of the thousands of persons arrested on suspicion of participating in the Liberation Movement had so far been brought to trial. Furthermore, the Legal Aid Foundation, an organization based in Jakarta, had described those trials as a "travesty of justice". In February 1991, in the Commission on Human Rights, the Indonesian Government had affirmed that 24 persons arrested during the disturbances and charged under the Indonesian Criminal Code were to be brought to trial. In his view, that had been a deliberate attempt to deceive the Commission, by concealing from it the fact that the interrogations had been conducted not by the police but by army units, and that torture had been practised systematically. He emphasized the fact that the persons on trial were being imprisoned for political rather than criminal offences.

12. Meanwhile, the extrajudicial killings were continuing, as was confirmed by the Indonesia Human Rights Campaign (TAPOL), by Asia Watch, and by many foreign journalists. The persecution was targeted on members of the Acheh/Sumatra National Liberation Front, who were claiming the right to self-determination for Sumatra, on the basis of General Assembly resolution 2711 (XXV) of 4 October 1970. In his view, the Javanese had seized the territory of the former colonial empire of the Dutch East Indies, and had merely changed its name to Indonesia: it had thus still to be decolonialized.

13. Mr. TOTSUKA (International Educational Development, Inc. - IED) welcomed the report by Mr. Joinet on the independence of the judiciary and the protection of practising lawyers (E/CN.4/Sub.2/1990/30); he wished to draw attention to the situation in China, where the judiciary was almost totally lacking in independence. Persons charged with criminal offences were presumed to be guilty rather than innocent, and, more often than not, were detained without a warrant. Trials were merely forums for determining sentencing, not for determining the innocence or guilt of a suspect. IED had been cooperating closely with Chinese reformists, including Mr. Zhang Boli, one of the student leaders of the 1989 democracy movement, who had fled China several months previously after spending two years in hiding, and who was on the list of the 21 most wanted criminals because of his activities in support of the pro-democracy movement. He had fled his country because he feared that he would not be given a fair trial before an independent court. In China, judges were answerable to adjudication, politics and law committees, which were dominated by the Communist Party. The judiciary had no independent body of its own. IED was convinced that judicial self-governance was essential, if the fundamental rights of detainees were to be guaranteed. Defence lawyers

were also subjected to restrictions and even persecution. In political trials - and especially the trials of participants in the pro-democracy movement - lawyers had to obtain authorization from the Ministry of Justice before submitting a plea of "not guilty". They also had very little time in which to prepare their defence.

14. Mr. TIAN Jin, speaking on a point of order, said that, in view of the limited time available to the Sub-Commission, statements by non-governmental organizations should confine themselves strictly to the agenda item under consideration. The Sub-Commission was not a free-for-all; its credibility was at stake.

15. The CHAIRMAN reminded the non-governmental organizations that their statements must be disciplined and to the point.

16. Mr. TOTSUKA (International Educational Development, Inc. - IED), resuming his statement, pointed out that lawyers were also victims of reprisals: Ji Suwan and Gao Xiaofeng, the attorneys for Chen Ziming (who had been sentenced to 13 years' imprisonment and stripped of his political rights for four years) had been disbarred. Chen Ziming and another pro-democracy militant, Wang Juntao, who, like him, had been sentenced to prison, had begun a hunger strike to protest at their conditions of detention, which contravened United Nations standards. He stressed most emphatically that attorneys must have free access to their clients from the moment of arrest, must be present at interrogations if their clients so desired, must have ample time and facilities to prepare a defence, and, of course, must not be subjected to any form of reprisals.

17. With regard to the situation in Pakistan, a number of laws promulgated since the removal of Miss Benazir Bhutto had had a negative effect on the independence of the judiciary and the protection of lawyers. First, as a result of the "Islamization of laws", judges were supposed to hand down opinions and punishments in keeping with Islamic law and, since there were many sects of Islam in Pakistan, it was for the Shariah courts to decide which laws were applicable in each case - no easy task, and hardly conducive to a uniform administration of justice. IED found it unthinkable that a civil and criminal justice system could function in accordance with international minimum rules when the judicial power was exercised by religious courts. Secondly, in 1990 a number of judges had been removed for obviously political reasons. Such had been the case with Mr. Justice Qazi Jamil of the Peshawar High Court; and of Mr. Justice Abdul Haveez Memon of the Supreme Court, who had been removed without explanation on 10 October 1990. Thirdly, after the dissolution of the National Assembly and the dismissal of Miss Bhutto, the new Government had established special courts under the Special Courts for Speedy Trial Ordinance and the Supression of Terrorist Activities (Special Courts) Act. IED considered that the existence of those and all special courts to be incompatible with the principle of an impartial judicial process. The special courts curtailed trials to the disadvantage of the accused and in favour of the Government, contradicting the purpose of the provisions of international human rights instruments in accordance with which proceedings must take place within a reasonable period, in the interest of the accused and of the

defence. Furthermore, the speedy trial legislation allowed the Government, not the court, to specify the manner and place of execution in death penalty cases. IED referred participants to a report by the Human Rights Commission of Pakistan regarding those issues, published in 1990.

18. In conclusion, IED reaffirmed that the practices applied in China and Pakistan undermined the independence of the judiciary and the protection of lawyers, and it urged the Special Rapporteur to take that information into account in his next report on the topic.

19. Mr. EYA-NCHAMA (International Movement for Fraternal Union Among Races and Peoples) noted with interest that, as indicated in paragraph 1 of Mr. Joinet's report (E/CN.4/Sub.2/1991/30), the Rapporteur had been entrusted with making a system-wide analysis of the advisory service and technical assistance programmes of the United Nations as regards the independence of the judiciary and the protection of practising lawyers proposing means by which the cooperation between the programmes could be enhanced and setting forth guidelines and criteria to be taken into account in the provision of those services.

20. The International Movement for Fraternal Union Among Races and Peoples placed great hopes in the advisory services programme on human rights, as it firmly believed that the international community could help countries to introduce a human rights culture into their legislation. Governments that requested access to those services did so either because they genuinely wanted to equip their country with a legal infrastructure that would make it possible to protect the fundamental rights of citizens, or, instead, because they thought that by doing so they could conceal the violations of human rights and fundamental freedoms committed by them. In that regard, it should be recalled that Equatorial Guinea, one of the countries to which the Centre for Human Rights had rendered assistance, and which was referred to by Mr. Joinet in paragraphs 56 to 61 and 77 to 79 of his report, had been the first country to be dealt with by the Sub-Commission under the confidential procedure established by Economic and Social Council resolution 1503 (XLVIII); the failure of the Government of Equatorial Guinea to cooperate had led the Commission on Human Rights to decide, in 1979, to study the situation in that country under the public procedure established by Council resolutions 8 (XXIII) and 1235 (LII), with the ensuing appointment of a Special Rapporteur on that country. Although the Government of Equatorial Guinea had accepted the plan of action proposed by the United Nations to promote and protect human rights and fundamental freedoms in Equatorial Guinea and which amounted to what was a programme for the democratization for the country, it had never implemented the plan. Quite the reverse, in order to remain in power, the military Government of the country had drawn up an anti-democratic Constitution which provided for more obligations than rights for citizens, while the obligations of the State reflected a paternalistic philosophy. Further, the Constitution conferred extensive powers on the President of the Republic, who exerted control over all the constitutional organs, whose representativity was extremely limited. It would thus seem that the assistance provided by the Centre for Human Rights to Equatorial Guinea had yielded meagre results, for the very good reason that the United Nations experts and the Government of the country did not speak the same language, the former using the language of democracy and the latter the language of dictatorship.

21. His organization supported the recommendations made by Mr. Joinet in paragraphs 303 to 312 of his report, and especially those contained in paragraphs 304, 305, 306 and 311. It urged the Sub-Commission to extend Mr. Joinet's mandate so as to enable him to report each year on activities undertaken in the context of the advisory services in the field of human rights.

22. Ms. GUZMAN (Latin American Federation of Associations of Relatives of Disappeared Detainees) said that events showed that, in most Latin American countries, the judiciary was not independent, on account of the political pressures exerted on judges in political cases, the intervention of military courts in cases of human rights violations involving members of the armed forces and the State security forces, who, consequently, did not have an impartial trial, the lack of a suitable infrastructure to enable magistrates to perform their duties properly, and the low salaries paid to judicial officials, which provided no incentive to dedication and, on the contrary, encouraged corruption. Nevertheless, it was always possible for those so wishing to dispense justice in an independent and impartial manner, and many magistrates had proved as much, particularly in Chile and Uruguay, by refusing to apply decisions contrary to the principles of justice.

23. Amnesty laws and pardons were the main obstacle to the proper administration of justice in a number of Latin American countries. It would suffice to mention the pardon granted in Argentina, by President Menem, to the officers who had been members of the ruling Junta during the dictatorship, although their guilt had been established. Similarly, in Honduras, by decree No. 87-91, the Government had granted a general and unconditional amnesty to all persons tried and sentenced or liable to be sentenced for political offences and criminal offences expressly referred to in certain chapters and articles of the Criminal and Military Codes, thereby allowing a number of military personnel responsible for human rights violations to go free. That decree had deprived the judiciary of any possibility of investigating the cases of 143 disappeared detainees and of applying the recommendations formulated by the Inter-American Court of Human Rights regarding the disappearances of Velásquez Manfredo and Saúl Godínez Cruz, for which the Honduran State had been held responsible. Her organization was convinced that the judiciary had an important role to play in defining the crime of enforced disappearance. That crime was currently set forth in the Criminal Code of Guatemala and in article 12 of Chapter 1 of Title 2 of the new Political Constitution of Colombia; it might also be included in the Colombian Criminal Code, which would make it possible to try all those responsible for such a crime in an appropriate manner. It should be stressed that the unyielding struggle of the families of Colombian and Guatemalan disappeared persons was responsible for that progress. Those families, who would continue to demand that justice be done and that an end be put to impunity, were determined to contribute their modest resources to ensure that the law punished the crime of enforced or involuntary disappearance.

24. Mr. PREJEAN (International Indian Treaty Council) began by thanking the Haudenosaunee delegation, which had taken the initiative at the previous meeting of calling upon the Great Spirit to exert a beneficial influence on the work of the Sub-Commission. It should be remembered that the Haudenosaunee Six-Nation Iroquois Confederacy had been a model for many

indigenous nations, and also for the United States, and that Lenin and Karl Marx, among others, had been influenced by the Six-Nation model. Since the invasion of their territory by the United States in January 1893, the indigenous inhabitants of Hawaii had been denied guarantees of due process and an impartial legal system. Their inherent right to sovereignty over their territory was stripped away by colonial courts imposed on them. In Hawaii, judges were usually appointed by politicians and not elected by the people. The indigenous citizens of Hawaii had no possibility of enforcing their rights in the context of an equitable judicial system. The case of Leonard Peltier, whose extradition had been authorized by Canada on the basis of fabricated evidence, was a typical example in that regard.

25. His organization could not accept a judicial system concerned primarily with protecting the federal coffers and maintaining the oppressive status quo. It was essential to re-establish indigenous legal systems and to restore to the indigenous peoples their land bases over which they would be able to exercise unfettered jurisdiction and sovereignty, and in which they would no longer be subjected to a legal system that undermined their very survival.

26. Mrs. GALVIS (Observer for Colombia), recalling that the Colombian Government had transmitted to the Centre for Human Rights extensive information on the statutory and constitutional provisions designed to guarantee the independence of the judiciary and of practising lawyers, said the she would have liked that information to have been more fully reflected in the report by Mr. Joinet, so as to enable readers to have a clear idea of justice in Colombia.

27. Under the technical assistance provided by the Centre, a number of training activities for judges and magistrates had been organized with the guidance of a United Nations expert, in the cities of Bogotá, Medellín and Cali. A training seminar had subsequently been held at Rome, under the auspices of the United Nations Development Programme and of the Centre, to pave the way, inter alia for exchanges of experience between Colombian magistrates specializing in drug trafficking cases and their opposite numbers in Italy. The seminar had proved very useful in strengthening the exercise of the judicial function in that area and was a good example of cooperation among various bodies to help a country in difficulties to resolve its problems. It should be stressed that UNDP had thus acknowledged the need to combine a cooperation component in its development activities with a view to ensuring respect for human rights. That extremely innovative experience was a model of dynamic interdisciplinary cooperation to encourage the establishment of genuine democracy associated with development in a country.

28. Reverting to the report, she regretted that Mr. Joinet had cited Colombia among the countries that had taken measures to strengthen the independence of judges and lawyers, and at the same time among those in which the existence of measures and practices that weakened the safeguards of independence and protection was noted. That gave rise to confusion, and made it impossible to assess clearly the current situation in Colombia. Furthermore, the Special Rapporteur ought to have drawn a distinction between events in Colombia from 1989 to 1990 and the situation from 1990 to 1991, in view of the fact that during the latter period the Government had begun to implement the new

measures adopted to combat drug traffickers. Evidence of that was the fact, as Mr. Joinet had noted, that only one lawyer was reported to have been killed during the latter period in circumstances which had not yet been explained. The inference was that the situation had improved in Colombia, and that the measures taken genuinely strengthened the independence of the judiciary. She wished to stress that in Colombia it was no longer possible for any civilian to be tried by military courts, which had jurisdiction only in cases involving military personnel who had broken the law while on duty. She also announced the recent restructuring of the judicial apparatus, one effect of which was to guarantee that the Public Prosecutor's Department would take particular care to assure the protection of victims, witnesses and other persons taking part in a trial.

29. Mr. van CRAEN (Observer for Belgium) thanked Mr. Joinet for embarking on a study on a very important aspect of the promotion of human rights, and congratulated him on his rigorous and critical analysis of all the initiatives taken and completed in the area under consideration.

30. While it was essential for the individual to be informed of his rights, it was equally important that magistrates, lawyers, military personnel and officials in general should be well aware that they had a duty to respect and enforce human rights and to ensure that the perpetrators of violations of those rights should be brought to justice; hence the importance of the United Nations advisory services and technical assistance programme. It had thus been necessary to see whether the goals set for that programme had in fact been achieved, and whether the resources deployed had been appropriate, a task to which the Special Rapporteur had applied himself with the requisite objectivity. Unfortunately, his analysis indicated that the answer to that question was in the negative, and that in consequence a major policy change was imperative. The Special Rapporteur had provided valuable information in that regard, and had in particular stressed, in paragraphs 46 and 47 of his report, the need to consider each case and each initiative in the light of well defined criteria. It might thus be useful and necessary for United Nations agencies as a whole to prepare what might be called a "handbook of criteria and methods of work in respect of technical assistance and advisory services". As was desirable and necessary, a strict application of those criteria and methods would undoubtedly help to enhance the effectiveness of the programmes, to make better use of the limited resources available, and to consolidate the cooperation among the various programmes.

31. Miss CHELUGET (Observer for Kenya), speaking in exercise of the right of reply, reaffirmed, in response to concerns expressed in the Sub-Commission about the independence of the judiciary in Kenya, that the Government of Kenya was committed to upholding the rule of law and respect for human rights. Recognizing the central role that the legal profession played in the orderly running of society, it had appointed Mr. Amos Wako, a lawyer and human rights advocate who was no stranger to the Sub-Commission, to the office of Attorney-General. Mr. Wako had pledged before Parliament to exercise his best endeavours to ensure that the law would not be used as an instrument of persecution and that laws would be used only to punish those who had violated them. Stressing that an independent judiciary was a prerequisite for the primacy of the law, he had undertaken to ensure that that independence, which was guaranteed by the Constitution, would be duly respected. His words served

as a summary of the commitment made by the Government to human rights, and it bore noting that a number of changes had taken place in Kenya since Mr. Wako's appointment.

32. Mr. DEMIRALP (Observer for Turkey), speaking in exercise of the right of reply, informed the representative of the International Commission of Jurists that the Turkish lawyer whose case he had raised in the Sub-Commission had been freed a few months earlier under the provisions of Act No. 3713 of 12 April 1991. The allegations by the ICJ were thus inaccurate, and he advised that organization to be more discerning in future in the choice of its sources of information. The Turkish Government was prepared to respond to any request for information submitted to it by that organization. He also drew ICJ's attention to the fact that in application of the aforementioned law, more than 20,000 prisoners had been freed, and that there were now less than 20,000 detainees in Turkish prisons, a low figure, bearing in mind that Turkey - which in fact had one of the lowest rates of imprisonment in the world - was a country with more than 55 million inhabitants.

33. Mr. SABORIO (Observer for Nicaragua), speaking in exercise of the right of reply, said that according to the statements made by the representative of the International Commission of Jurists at the previous meeting, the new Government of Nicaragua had increased the number of magistrates constituting the Supreme Court of Justice as a means of exerting better control over the judiciary. However, the democratic Government of Nicaragua respected human rights and constitutional principles. Article 129 of the Constitution provided for the separation of the executive, legislative, judicial and electoral powers. Consequently, the judiciary had no control over the other powers. Under the terms of Chapter V of the Constitution, the National Assembly elected the Supreme Court of Justice, of whom there were once again nine members, as had been the case before the assumption of power by the Sandinista Government. Five of those magistrates had taken up their duties under the Sandinista regime, and the four others had been elected recently by the National Assembly. Lastly, judicial decisions were taken in application of the law, not on the basis of political motives.

34. Mr. BEN MALEK (Observer for Tunisia), speaking in exercise of the right of reply, said that in its statement at the previous meeting, the International Commission of Jurists had cited Tunisia among those countries in which special and military courts had replaced civil courts in recent years. That was not the case, on the contrary; since the changes that had taken place on 7 November 1987, Tunisia was striving to promote public freedoms and human rights and to consolidate the rule of law. That choice of democracy was irreversible.

35. To dispell any uncertainty, he specified that the Cour de sûreté de l'Etat - a court of special jurisdiction - had been abolished by Act No. 87-79 of 29 December 1987, a little more than a month after the changes that had taken place in 1987, and that the Tunisian Human Rights League had welcomed that decision. Furthermore, the judicial and administrative courts were functioning in accordance with the powers assigned to them, and the military court had limited powers. Of course, anyone having dealings with the courts was entitled to all the statutory guarantees provided for in current legislation, in compliance with the institutions of the Republic.

36. Mr. WIDONO (Observer for Indonesia), speaking in exercise of the right of reply, said that once again the Sub-Commission had heard unfounded allegations that thousands of people had been killed, tortured or summarily executed in the province of Aceh in Indonesia. Those allegations, which had already been made at the previous session of the Commission on Human Rights and in communications regarding human rights, came from the leader of a European-based separatist group that was seeking to discredit Indonesia.

37. The disturbances that had taken place in the province of Aceh from the end of 1989 until early 1990 had not been politically motivated, but had been a violent reaction to the measures taken by the authorities to eradicate cannabis. In order to put an end to the disturbances and punish those responsible, the Indonesian authorities had been obliged to intervene, within the law. Regrettably, a number of criminals had been killed, and others had been detained and questioned. Of the 24 persons directly involved in those activities, 18 had already been tried in proceedings open to the public and to the press, which had duly reported them. Those involved had been sentenced to terms of between 5 and 20 years' imprisonment; 10 of them had since appealed to the High Court. Details of the cases referred to in the communications had been transmitted to the appropriate United Nations bodies. Furthermore, 261 of those arrested for their involvement in those activities had been released on Independence Day, 17 August 1991, in addition to those who had been released previously. Finally, the International Committee of the Red Cross had been allowed to visit the province of Aceh in order to interview detainees.

38. Given that the province of Aceh formed part of Indonesia, his delegation categorically rejected the statements made previously, since it was obvious that the boundary between concern for human rights and promotion of the interests of a separatist group was very slight.

39. Mr. ILKAHANAF congratulated Mr. Joinet on his very informative report and the International Commission of Jurists on its annual report on that topic. They should continue that work, which was useful not only to the Sub-Commission, but also to the other international organizations, for an independent judiciary was essential in order to promote human rights. Without an independent judiciary, there could be no democracy, fundamental freedoms or human rights safeguards. If there was interference in the decisions of judges and the conduct of trials, there was no longer any impartiality. Yet in certain situations, such as civil war, internal confict, dictatorship or totalitarianism, the judiciary was deprived of that indispensable protection.

40. He said that the consideration of the extremely interesting reports presented under that agenda item by Mr. Alfonso Martínez, Mrs. Bautista, Mr. Chernichenko, Mr. Treat and Mr. Despouy could take up the entire session.

41. With regard to the jurisidiction of military courts, offences committed by civilians in zones under military control were often equated with military offences. Military courts sometimes also tried offences such as those committed by one soldier against another, or against army property. Offences of that kind must, irrespective of other considerations, be tried in compliance with all the requirements for a fair trial.

42. Mr. SACHAR said that the right of habeas corpus was embodied in the Constitution of India, even if a state of emergency was declared. Article 21 of the Constitution, concerning the right to life, could not be suspended. On the question of administrative detention, Mr. Joinet had pointed out the previous year in his report (E/CN.4/Sub.2/1990/29 and Add.1) that the practice was widespread. The question thus arose as to what remedies were available to persons held in administrative detention. Under Indian law, people could be detained by decree for reasons of security and public order, but they must be informed of the reasons for their detention within a period of four days. In addition, the evidence regarding the case was examined by a judge of the Supreme Court and by two other magistrates. In that regard, it must be remembered that each state of India had its own Supreme Court. It was thus not possible to deny the existence of cases of administrative detention in India, but those concerned could have recourse to the courts; and the delays sometimes noted in the procedure were probably attributable to the fact that files had been held up in one of the departments concerned.

43. The procedure applicable to military offences in India was a legacy of the British system. There were no military courts as such, but only a disciplinary court of the armed forces, whose decisions could be contested. Members of the armed forces could receive long sentences if they had violated fundamental principles of human rights. All that went to show that in India there could be no derogation from the remedy of habeas corpus even if there were sometimes difficulties in its application.

44. Mr. DESPOUY thanked all those who had made useful comments on the subject of his report on the question of human rights and states of emergency (E/CN.4/Sub.2/1991/28). He had noted that several non-governmental organizations felt that there was a need to expand the principles applicable in that area at the national level. There had also been a good deal of emphasis on the rights from which there could be no derogation, and on the need to provide further information on them. Mr. Khalil had rightly drawn attention to the link between the report and the activities of the working group of five independent experts entrusted by the Commission on Human Rights at its previous session with the task of investigating cases of arbitrary detention. The comments made by other experts, and particularly by Mr. Flinterman, would also be taken into account.

45. The report by Mr. Chernichenko and Mr. Treat on the right to a fair trial (E/CN.4/Sub.2/1991/29) showed that one of the main problems was to distinguish between normal situations and states of emergency. In that certain safeguards no longer existed after a state of emergency had been proclaimed, how was it possible to assess whether or not there could be a fair trial in such circumstances? In his own report, he referred to the problem of cases of protracted detention, sometimes for 20 or 30 years, without the possibility of recourse to habeas corpus or any other safeguard. That aspect of the question, which had enormous consequences from the human rights standpoint, merited further study.

46. The Sub-Commission should also continue its consideration of the question of impunity dealt with by Mr. Guissé and Mr. Joinet, who had selected a satisfactory methodology. At its next session, the Sub-Commission should also

return to the question of minimum humanitarian standards, seeking the opinion of representatives of the various legal systems, and tackling the question not only from the standpoint of normal situations, but also from that of states of emergency.

47. The non-governmental organizations had rightly referred to the contribution by Governments that communicated information on the proclamation or suspension of states of emergency. Thailand, for instance, had announced that martial law had been suspended on 3 May 1991. The list of States that had proclaimed, extended or abrogated a state of emergency, which he himself had submitted, should enable the non-governmental organizations and Governments to formulate their comments or criticisms and to provide additional details. In conclusion, he said that he supported all of the suggestions made with regard to his report, and hoped that his mandate would be renewed.

48. Mr. TREAT said that Mr. Despouy had made some useful remarks about the report presented by Mr. Chernichenko and himself on the right to a fair trial. The three Special Rapporteurs would do well to coordinate their work, which was related in various ways. Mr. Türk had rightly emphasized the need to take account of all the relevent factors affecting the right to a fair trial and to tackle the question of the military courts that tried civilians. The Special Rapporteurs would also look further into the question of the right of the accused to immediate access to a lawyer, and the question of the conflict between the inquisitorial procedure and the adversary procedure. Mr. Türk had also rightly stressed that that study would be a useful instrument for legislators.

49. Mr. Flinterman had also made some interesting observations and the two Special Rapporteurs subscribed to his idea of extending the study to civil procedure at a later date, and ultimately of drafting a model code. Mr. Alfonso Martínez had wanted visiting rights to be granted not only to close relatives, but also to other family members; he had also wanted foreigners charged with an offence to be allowed to have access to the services of an interpreter in order to defend themselves. To allay the concerns of those who found the questionnaire appended to the report to be too long, he said that a shorter questionnaire was also being tramsitted to Governments. Although some Governments had been slow in replying, the Special Rapporteurs were nevertheless continuing to receive replies. In conclusion, he expressed his satisfaction at working with Mr. Chernichenko; their collaboration had made it possible to reconcile two very different legal systems in order to prepare a report that should contribute to the development of international legal standards.

50. Mr. CHERNICHENKO said that the large number of comments made on the study would of course be taken into account, even if it was not possible to incorporate them all in the next report. He thanked the other members of the Sub-Commission for their very useful comments, and the Secretariat for its help.

51. Mr. ALFONSO MARTINEZ regretted the fact that he had not been able to be present throughout the debate on that important agenda item, and, in particular, on his report on the privatization of prisons E/CN.4/Sub.2/1991/56). He would therefore study the summary records and would listen to the recordings of the meetings in order to take due account of all the observations made.

52. Mr. JOINET summarized the comments made with regard to his report (E/CN.4/Sub.2/1991/30 and Add.1-4). The optimization of advisory services, the wish most frequently expressed, would require increased resources. Thought had been given to attaching the Vienna-based Crime Prevention and Criminal Justice Branch to the Centre for Human Rights in order to be able to have the necessary resources, but that operation seemed premature for the moment. Emphasis had been laid on the promotion of national programmes - which was already taking place in Senegal - and also on coordination with the lending institutions, particularly those within the United Nations system, the working relations of Colombia and Paraguay with UNDP being a good example of that coordination.

53. Turning to the measures and practices aimed at strengthening the safeguards of independence and protection, or those which, conversely, had weakened them, he said that the judges killed in Colombia had clearly not been murdered on the orders of the Government, in view of the fact that the Government was itself a victim and was requesting assistance. He noted that attention had been drawn to the fact that the question of corruption had not been dealt with in his report. He pointed out that it had been proposed to extend protection measures to the judges who had had to combat terrorism or the Mafia and who had since retired, as well as to all auxiliary judicial staff, including registrars. He noted that it had been regretted that the question of the transparency needed in the administration of justice so as to ensure that criticisms could be voiced in the interest of that justice had not been tackled. It had also been deemed regrettable that, while part one treated the measures advocated or adopted by Governments and part two set forth various allegations, no concommitant proposal was made to Governments. In his view, that was the most difficult part of the process, and it could take place only at a subsequent stage, in cooperation with the parties concerned, particularly the advisory services. He took note of the confirmation of what he himself had proposed in his report, namely, that the protection of persons was, if not a priority, at any rate more pressing than their training. He remarked that the court of special jurisdiction as a means of guaranteeing the physical integrity of persons, on which the report said nothing, was a sensitive issue, and must be studied in greater depth, and that the term "of special jurisdiction" was in any case perhaps not the correct one, since the procedure was regarded as perfectly democratic in some countries. It would perhaps be appropriate to formulate regional standards, but if such courts were to be set up, the question would then arise of how far one could in fact go in that regard. That whole issue was also of relevance to the report on freedom of expression and opinion prepared in conjunction with Mr. Türk (E/CN.4/Sub.2/1991/9), and also to the working paper E/CN.4/Sub.2/1991/WP.5, prepared together with Mr. Guissé, on the question of impunity.

54. As for the adversary method used to analyse the various positions, he explained that it was a tentative approach, and that if his report was to have a future, the virtues of that method should be discussed as a matter of priority.

55. Turning to the statements by government observers, he said that he was ready to meet any speakers who so wished, in order to optimize the cooperation necessary for the success of the Sub-Commission's work. He wished first and foremost to clear up a misunderstanding with regard to Colombia. The criticism he had made of the advisory services in general could not fairly be applied to that country, in which, advisory services had proved to be entirely satisfactory. As for the more general measures taken by the Government of Colombia, he drew attention to paragraph 221 of his report, in which he paid a tribute to the initiative taken by the Government and to the spirit of cooperation displayed by the political forces involved.

56. Speculating on the possible future of the work that his report might initiate, he spoke of the great ignorance that prevailed with regard to the situation of the magistracy, an ignorance that was probably attributable to the fact that it was a body whose members were bound by an obligation to maintain a certain discretion and who, probably in consequence of that obligation, were unable to organize themselves, inter alia, in the face of danger. In his view, the report thus constituted the initial stage of an investigation.

57. The CHAIRMAN said that, if there was no objection, he would take it that the members of the Sub-Commission adopted the report of the sessional Working Group on Detention contained in document E/CN.4/Sub.2/1991/27.

58. It was so decided.

59. The meeting was suspended at 6.05 p.m. and resumed at 6.35 p.m.

CONSIDERATION OF DRAFT RESOLUTIONS AND DECISIONS RELATING TO AGENDA ITEM 6 (E/CN.4/Sub.2/1991/L.5; E/CN.4/Sub.2/1991/L.13; E/CN.4/Sub.2/1991/L.14; E/CN.4/Sub.2/1991/L.15; E/CN.4/Sub.2/1991/L.16; E/CN.4/Sub.2/1991/L.17; E/CN.4/Sub.2/1991/L.18; E/CN.4/Sub.2/1991/L.19; E/CN.4/Sub.2/1991/L.20; E/CN.4/Sub.2/1991/L.21; E/CN.4/Sub.2/1991/L.22)

60. The CHAIRMAN reminded members of the interpretation of rule 59 of the rules of procedure given by the Economic and Social Council in resolution 1991/32 on strengthening the independence of experts. If there was no objection, he would take it that the experts agreed that, in the event of a vote on draft resolutions affecting particular countries, that vote would be taken by secret ballot.

61. It was so decided.

62. Mr. ALFONSO MARTINEZ, speaking by virtue of the right conferred upon him by rule 57 of the rules of procedure, asked that, in order to respect both the letter and the spirit of Economic and Social Council resolution 1991/32, all draft resolutions referring to particular countries, without exception, should be put to the vote, as should all decisions relating thereto (on amendments, etc.). Thus, by holding a secret ballot, experts would avoid exposing themselves to risks by requesting that a particular draft should be put to the vote.

63. The request by Mr. Alfonso Martínez gave rise to a discussion in which Mrs. ATTAH, Mr. ILKAHANAF, Mr. HELLER, Mr. DESPOUY, Mrs. KSENTINI, Mrs. WARZAZI, Mr. YIMER, Mr. van BOVEN and Mr. TREAT took part.